Justice Sotomayor on the First Amendment

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Lane v. Franks (2014)

- Edward Lane was a public employee at Central Alabama Community College who was terminated after he testified truthfully in court that he fired a state representative on the college's payroll who was paid but did not perform her duties. The trial was a criminal case against the representative for mail fraud and theft.
- After Lane testified, the college terminated him.
- He sued, alleging that he was retaliated against for his speech.

Lane v. Franks (2014)

- A federal district court dismissed the lawsuit, reasoning that Lane's First Amendment claim was foreclosed by the U.S. Supreme Court's decision in *Garcetti v. Ceballos* (2006).

- The Court in *Garcetti* held that when public employees make statements pursuant to their official job duties, the First Amendment does not insulate them from discipline.

Lane v. Franks (2014)

- The Eleventh Amendment affirmed and ruled against Lane based on Garcetti.

- The 11th Circuit wrote "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech 'owes its existence to [the] employee's professional responsibilities' and is 'a product that the "employer himself has commissioned or created."

Lane v. Franks (2014)

- "The sworn testimony in this case is far removed from the speech at issue in *Garcetti*—an internal memorandum prepared by a deputy district attorney for his supervisors recommending dismissal of a particular prosecution."

- "In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."

Lane v. Franks (2014)

- "Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment."

Nieves v. Bartlett (2019)

- The case arose from a dispute at "Arctic Man" a winter sports festival in the Hoodoo Mountains near Paxson, Alaska between festival attendee Russell Bartlett and two police officers, Sergeant Luis Nieves and Trooper Bryce Weight.

Nieves v. Bartlett (cont.)

- Nieves was asking some partygoers to move their beer keg inside an RV to prevent minors' consumption of alcohol. According to Nieves, the intoxicated Bartlett yelled at the RV owners not to speak to Nieves. Nieves contended that Bartlett yelled at him. Bartlett contended he was not drunk and that it was Nieves who was the aggressor.

Nieves v. Bartlett (cont.)

- A few minutes later, Bartlett saw Trooper Weight asking a minor whether he and his underage colleagues were drinking. According to Weight, Bartlett approached in an aggressive manner and yelled with slurred speech that the minors should not speak to the officer. Weight pushed Bartlett who got close to him. Nieves then rushed over and arrested Bartlett for disorderly conduct and resisting arrest.

Nieves v. Bartlett (cont.)

- The state dismissed the criminal charges against Bartlett, who then filed a civil-rights lawsuit against both Nieves and Wright, alleging that they retaliated against him by arresting him for his protected speech – not speaking to Nieves in the initial confrontation and telling the minors not to speak to Weight.
- The officers countered that they arrested Bartlett because he interfered with an investigation and initiated a physical confrontation with Weight. A federal district court granted summary judgment to the officers, reasoning that they had probable cause to make the arrest.

Nieves v. Bartlett (cont.)

- On appeal, however, the 9th U.S. Circuit Court of Appeals reversed. The appeals court reasoned that there was at least some evidence of possible retaliation – a statement in Bartlett's affidavit stating that Nieves told him: "Bet you wish you would have talked to me now."

- However, the U.S. Supreme Court reversed the 9th Circuit and ruled in *Nieves v. Bartlett* (2019) that most retaliatory arrest claims will fail if the arresting officers had probable cause to effect the arrest.

Nieves v. Bartlett (2019)

- Writing for the majority, Chief Justice John G. Roberts, Jr. reasoned that "the presence of probable cause should generally defeat a First Amendment retaliatory arrest claim" citing the Court's recent decisions in *Hartman v. Moore* (2006) and *Lozman v. Riviera Beach* (2018).
- The majority reasoned that retaliatory arrest claims are "particularly difficult" because it is hard to determine whether an officer's conduct was caused by malice on the part of the officer or the plaintiff's potentially criminal conduct. Roberts analogized retaliatory arrest claims to common-law tort claims for malicious prosecution and false arrest, which generally require a plaintiff to show an absence of probable cause.

Nieves v. Bartlett (cont.)

- However, Roberts did offer an exception to the general rule for those cases in which a civil rights plaintiff can show that he or she was **treated differently than similarly situated individuals who did not utter the same protected speech**. This exception is somewhat akin to a selective prosecution type claim.
- Applying these standards, Roberts concluded that there is insufficient evidence of retaliation by Trooper Weight. Roberts also wrote that the claims against both officers must fail because there was probable cause for the arrests.

Nieves v. Bartlett (2019)

- Sotomayor dissents, writing that "neither the text nor the common-law backdrop of §1983 supports imposing on First Amendment retaliatory arrest claims a probable-cause requirement that we would not impose in other contexts."

Nieves v. Bartlett (2019)

- "There is no basis in §1983 or in the Constitution to withhold a remedy for an arrest that violated the First Amendment solely because the officer could point to probable cause that some offense, no matter how trivial or obviously pretextual, has occurred."

Nieves v. Bartlett (2019)

- I follow this logic to its natural conclusion: Courts should evaluate retaliatory arrest claims in the same manner as they would other First Amendment retaliation claims. The standard framework for distinguishing legitimate exercises of governmental authority from those intended to chill protected speech is well established. See *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). The plaintiff must first establish that constitutionally protected conduct was a "'substantial'" or "'motivating'" factor in the challenged governmental action (here, an arrest). If the plaintiff can make that threshold showing, the question becomes whether the governmental actor (here, the arresting officer) can show that the same decision would have been made regardless of the protected conduct. If not, the governmental actor is liable."

Nieves v. Bartlett (cont.)

- Justice Sotomayor warned that the Court's decision as a whole "will breed opportunities for the rare ill-intentioned officer to violate the First Amendment without consequence – and, in some cases, openly and unabashedly."

- "Put into practice, the majority's approach will yield arbitrary results and shield willful misconduct from accountability."

Perez v. Florida (2017)

- Robert Perez was upset that a convenience store clerk would not sell him any more beer. He allegedly ranted that he could come back and blow up the store.
- For this drunken rant, he was charged with making a threat --- and got convicted.
- The Court denied review in the case.

Perez v. Florida (2017)

- Perez was convicted under a Florida law that makes it a felony "to threaten to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person."
- A jury convicted him, and he was sentenced to 15 years in prison. The jury instructions provided that the jury need only determine that Perez made the threatening statements. After failing in the Florida appellate courts, he filed a petition with the U.S. Supreme Court.

Perez v Florida (cont.)

- The Court declined to hear his appeal. Sotomayor agreed that it was proper to deny the petition, because the First Amendment issues were not addressed in the lower courts. However, she wrote that the Court needed to clarify its true threat jurisprudence that included *Watts v. United States* (1969), *Virginia v. Black* (2003), and *Elonis v. United States* (2015).

Perez v. Florida (cont.)

- She wrote that the jury instruction and Perez's conviction raised serious First Amendment concerns, because his drunken ramblings likely were not statements indicating a real intent to cause harm.
- Justice Sotomayor noted that Mr. Perez is probably spending 15 years in prison for a drunken rant, rather than something truly intended as a threat. She quoted a prosecutor in the case who acknowledged that the guy may have been "just a harmless drunk guy at the beach."

Perez v. Florida (2017)

- "Together, *Watts* and *Black* make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words — *some* level of intent is required," she wrote. "And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat— a jury must find that the speaker actually intended to convey a threat."

Iancu v. Brunetti (2019)

- Erik Brunetti, an artist and entrepreneur, founded a clothing line with the trademark FUCT, which he said stood for Friends U Can't Trust. He sought to register the trademark, as official registration brings additional benefits to the trademark owner. However, the Patent and Trademark Office determined the proposed mark was "a total vulgar" and had "decidedly negative sexual connotations."

Brunetti (cont.)

- In her majority opinion, Justice Elena Kagan determined that, like the ban on disparaging marks invalidated in *Matal v. Tam* (2017), the "immoral or scandalous" marks provision discriminated on the basis of viewpoint.
- Kagan recounted a long list of rejected marks to show the viewpoint discriminatory application of the law. The government sought a narrower construction, but Kagan wrote: "The statute as written does not draw the line at lewd, sexually explicit, or profane marks."

Brunetti (cont.)

- Justice Sotomayor concurred in part and dissented in part.
- She concurred that the ban on "immoral" trademarks violated the First Amendment but she would apply a narrowing construction to the ban on "scandalous" trademarks and limit that to marks that were obscene, profane, or vulgar.

Brunetti (cont.)

- "Unquestionably, 'scandalous'" can mean something similar to "immoral" and thus favor some viewpoints over others. But it does not have to be read that way."

- "Adopting a narrow construction for the word 'scandalous'—interpreting it to regulate only obscenity, vulgarity, and profanity—would save it from unconstitutionality. Properly narrowed, 'scandalous' is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system."

Americans for Prosperity Foundation v Bonta (2021)

- In *Americans for Prosperity foundation v. Bonta*, 594 U.S. ____ (2021), the U.S. Supreme Court invalidated a California requirement that charities disclose the names and addresses of those who contributed $5,000 or more a year as part of the charity's annual registration with the state attorney general's office.

Bonta (cont.)

- The Americans for Prosperity Foundation, the Thomas More Law Center and other charities faced suspension of their registrations and fines because they declined to provide these names in order to preserve their donors' anonymity. They claimed that the requirement infringed upon their donors' rights of association protected under the First Amendment

Bonta (cont.)

- Chief Justice John Roberts wrote the majority 6-3 decision, which concluded that the regulation burdened First Amendment associational rights and was invalid on its face because it was not narrowly tailored to an important government interest. He relied heavily on factual information gathered by the trial court that suggested that the state had rarely used the information to initiate prosecutions and had inadequately protected the information against third-party access.

Bonta (cont.)

- Justice Sonya Sotomayor wrote a dissent (joined by Justices Stephen Breyer and Elena Kagan.) Sotomayor did not believe the charities had demonstrated "an actual First Amendment burden" — that disclosure would expose them to objective harms, such as threats or harassment, that the NAACP and other organizations had demonstrated in earlier cases. She wrote that the "[d]isclosure requirements burden associational rights only indirectly and only in certain contexts" that she did not find to be present here.